Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

HOWARD BROWN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a trial for aggravated rape of his 11-year-old stepdaughter, does the defendant's Sixth and Fourteenth Amendment right to present a defense require that otherwise inadmissible hearsay testimony regarding the victim's alleged prior sexual activity be admitted into evidence?

LIST OF PARTIES

All of the parties to this criminal case are named in the caption.

There are no entities to report or list pursuant to Supreme Court Rule 29.6.

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The majority and dissenting opinions of the Tennessee Supreme Court are "for publication," but have not yet been published. *State v. Howard Brown*, ___ S.W.3d ___ (Tenn., filed January 24, 2000) (for publication). The Supreme Court's opinions and the judgment order filed on January 24, 2000, are set forth at Appendix pages 1-44.

The opinion of the Tennessee Court of Criminal Appeals is unpublished. *State v. Howard Brown*, No. 03C01-9505-CR-00139 (Tenn.Crim.App., filed December 11, 1997). The judgment and opinion of the Court of Criminal Appeals are set forth at Appendix pages 45-57.

STATEMENT OF THE BASIS FOR JURISDICTION

The Tennessee Supreme Court entered judgment on January 24, 2000. No party sought rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant Howard Brown was convicted of aggravated rape of his 11-year-old stepdaughter. In a three-to-two decision, the Tennessee Supreme Court reversed the conviction. The majority ruled that Brown should have been allowed to introduce hearsay evidence that the child was sexually active. Although recognizing that the proffered evidence was purely hearsay, inadmissible in any other circumstance, the court concluded that exclusion of the hearsay violated Brown's Sixth and Fourteenth Amendment right to present a defense.

Trial Court Proceedings

The defendant was indicted on three counts of aggravated rape and one count of aggravated sexual battery, all involving his forced sexual abuse of his stepdaughter. The victim testified that early in the school year of 1991, when she was 11 years old and in the sixth grade, her stepfather kept her home from school one day on the pretense that she was ill. While they were alone at home the defendant fondled and touched her and forced her to engage in oral sex on two separate occasions. On two other days during the succeeding several weeks, the defendant forced her to submit to sexual intercourse. On December 9, 1991, the victim reported the sexual abuse to her aunt, who immediately told the girl's mother. The mother then took the child to the emergency room at the University of Tennessee Medical Center.

The victim's aunt confirmed that the child told her of the sexual abuse by the defendant, and that she immediately informed the girl's mother. The victim's sixth grade homeroom teacher confirmed that the child missed two days of school in September 1991, five days in October and one day in November. The teacher said that she noticed a change in the child's attitude and personality after the October absences.

The emergency room physician who examined the victim on December 9, 1991, testified that he found a large, healed tear of the victim's hymen. He opined that the tear occurred several weeks before the examination, and that it was consistent with forced or consensual vaginal penetration and consistent with the history given by the victim.

The defendant presented two witnesses at trial. A friend of the victim testified that on one occasion sometime during the winter of 1991 she and the victim skipped school together. The defendant himself testified, denying that any sexual abuse ever occurred. He admitted that he had been at home alone with his stepdaughter on occasion but said that he had kept her home from school only once due to illness. He testified that in the fall of 1991 he disciplined the girl after catching her with an older boy.

Before trial the defendant filed a motion under Tenn. R. Evid. 412 (Tennessee's "rape shield" rule) for leave to present evidence that the victim was sexually active. The proffered evidence was the testimony of a teenaged friend of the victim that the victim had twice told her that she [the victim] had been having sex with a certain adolescent male. That witness and another teenaged friend of the victim were also prepared to testify that they had observed the victim engaged in kissing and fondling with the same boy.

In response, the State filed a motion seeking exclusion of the evidence of prior sexual activity by the victim. After a hearing, the trial court denied the defendant's motion, finding that the defendant failed to comply with notice requirements under the rape shield rule.

At trial, the defendant neither sought leave nor attempted to cross-examine the victim regarding any prior sexual activity. App. 7. The jury convicted Brown on one count of aggravated rape, and the trial court sentenced him to 20 years imprisonment.

The First-Tier Appeal

The Tennessee Court of Criminal Appeals affirmed the conviction. The appellate court disagreed with the trial court's ruling regarding the notice provisions of the rape shield rule and instead found that the defendant satisfactorily complied with the procedural requirements. Further, the court found that evidence of the victim's prior sexual activity would have been allowed under an exception to the rape shield rule to rebut or explain medical testimony regarding the victim's hymenal tear. Tenn. R. Evid. 412(c)(4). Nonetheless, the court concluded that the proffered evidence was properly excluded in this case because it was hearsay. App. 51-52.

The Tennessee Supreme Court Decision

The Tennessee Supreme Court granted discretionary review. That court agreed with the intermediate appellate court's conclusion that the proffered evidence qualified for the rape shield rule's exception for evidence tending to rebut or explain medical evidence. The Supreme Court also agreed that "the proffered evidence transgresses the rule against the introduction of hearsay evidence." App. 2. In a three-to-two decision, however, the majority of the Supreme Court ruled that exclusion of the hearsay violated the defendant's constitutional right to present a defense. The court accordingly reversed the conviction and remanded the case for a new trial.

In so ruling, the majority pointed to the Sixth and Fourteenth Amendments to the United States Constitution as guaranteeing a criminal defendant the right to present a defense. App. 10. The majority then relied upon

two decisions of this Court, *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Green v. Georgia*, 442 U.S. 95 (1979), for the proposition that "[t]he constitutional right to present a defense has been held to 'trump' the rule against hearsay. . . . " App. 12. Following its restatement of a three-step analysis from the *Chambers* opinion, the majority considered (1) whether the excluded evidence was "critical to the defense;" (2) whether the evidence "bears sufficient indicia of reliability;" and (3) whether the interest supporting exclusion of the evidence is substantially important." App. 14, citing *Chambers*, 410 U.S. at 298-301.

The majority found that the excluded evidence was "substantially critical to the defense" because "it offers the jury an alternative explanation for the hymenal injury" other than the alleged criminal act. App. 15-16. The court ruled that the proffered hearsay "appears to be reliable" because the witnesses were friends of the complainant and had no animosity toward her and because there was no apparent motive to fabricate the evidence. App. 16. Further, the court found the reliability of the hearsay to be "buttressed by its similarity" to an admission by a party-opponent, which would qualify for a hearsay exception under Tenn. R. Evid. 803(1.2)(A). App. 16. The court took pains to clarify, however, that the complaining witness in a criminal case is not a "party" for purposes of that exception and thus that the exception was not applicable in this case; it referenced the exception only by analogy. App. 17. Finally, the court found that the State's interest in excluding hearsay was outweighed by the defendant's interest in presenting the evidence, precisely because of its earlier finding that the evidence "has considerable assurances of reliability and is actually very

similar to evidence that is permitted as an exception to the hearsay rule." App. 18-19. Accordingly, the majority found that, as to the proffered hearsay testimony, the defendant's constitutional right to present a defense "trumped" the hearsay rule.

Two justices joined in a dissenting opinion, arguing that the holdings in *Chambers* and *Green* are limited to their own particular facts and circumstances and do not "abrogate a valid and nonarbitrary rule against hearsay evidence." App. 21. The dissenters argued that, unlike the third-party confessions – statements against the declarants' penal interests – found to be reliable in *Chambers* and *Green*, the proffered hearsay in this case, supposed claims by an 11-year-old that she had had sex, bore little assurance of reliability. App. 36-37. Also, the hearsay was not critical to the defense because the defendant "could have introduced admissible, competent, and reliable evidence to show prior sexual activity by simply asking the victim whether she had prior sexual contact." App. 21. In any event, the dissent pointed out, unlike the third-party confessions in *Chambers* and *Green*, the proffered testimony here "was not truly exculpatory in the sense that even if the victim had engaged in prior sexual activity with an adolescent male, she still could have been a victim of rape at the hands of the defendant." App. 39. Therefore, the dissenters argued that it was neither necessary nor appropriate to invoke the narrow holdings of *Chambers* and *Green*. Further, the dissenters warned that by misapplying those holdings the majority was "creating an amorphous rule that will abridge an established

hearsay rule precluding admission of unreliable and untrustworthy evidence." App. 41.

REASONS FOR GRANTING THE WRIT

Relying entirely upon this Court's decisions in *Chambers* and *Green*, the Tennessee Supreme Court reversed an aggravated rape conviction because the trial court excluded evidence that even the Tennessee high court recognized as completely inadmissible hearsay. To reach that conclusion, the Tennessee court embarked on an unwarranted and erroneous expansion of the self-limited *Chambers* and *Green* holdings. The resulting loose application of the *Chambers* and *Green* analysis seriously threatens to destroy any sense of balance between a criminal defendant's Sixth and Fourteenth Amendment right to present a defense and the states' "unquestionably . . . legitimate interest in ensuring that reliable evidence is presented to the trier of fact." *United States v. Scheffer*, 523 U.S. 303, 309 (1998). The Tennessee decision thus conflicts with the precedents of this Court and the decisions of numerous federal and state courts that have considered *Chambers* and *Green*.

In ruling that the defendant's right to present a defense "trumps" the venerable, widely respected rule against hearsay, the Tennessee court strained to transform the *Chambers* and *Green* holdings into a generally applicable constitutional principle. This Court and other courts have repeatedly emphasized, however, that the decisions in *Chambers* and *Green* were limited to the particular facts and circumstances presented in those cases. *Scheffer*, 523

U.S. at 316; *Montana v. Egelhoff*, 518 U.S. 37, 52-53 (1996) (plurality opinion).[1]

In *Green*, the Court described the circumstances there as "unique." *Green*, 442 U.S. at 97. The Court in *Chambers* emphasized that it was establishing "no new principles of constitutional law" and that it signaled no "diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Chambers*, 410 U.S. at 302-303.

Chambers, of course, involved far more egregious limitations on the accused's ability to defend himself than did the mere exclusion of hearsay in this case. In *Chambers*, the defendant was effectively foreclosed by the operation of antiquated Mississippi evidence rules from proving that another man, McDonald, had confessed to the murder for which Chambers was on trial. Chambers called McDonald as a witness and introduced his sworn out-of-court confession. On cross-examination, the State brought out that McDonald had repudiated the confession during preliminary hearing. When Chambers then attempted to examine McDonald as an adverse witness, to challenge his repudiation of the confession, Chambers was prevented from doing so by Mississippi's "voucher"

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[1] *See also, e.g., Welcome v. Vincent*, 549 F.2d 853, 857 (2d Cir. 1977), *cert. denied*, 432 U.S. 911; *McGinnis v. Johnson*, 181 F.3d 686, 692 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 955 (2000); *Gacy v. Welborn*, 994 F.2d 305, 316 (7th Cir. 1993), *cert. denied*, 510 U.S. 899; *United States v. Fowlie*, 24 F.3d 1059, 1069 (9th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995); *Gudinas v. State*, 693 So. 2d 953, 965 (Fla. 1997), *cert. denied*, 522 U.S. 936; *State v. Bunyan*, 154 N.J. 261, 270, 712 A.2d 1091, 1095 (1998).

rule that disallowed impeaching one's own witness. *Chambers*, 410 U.S. at 291, 294.

Chambers then attempted to introduce the testimony of three witnesses to whom McDonald had spontaneously confessed to the murder shortly after it occurred. *Id.*, 410 U.S. at 300. The testimony was excluded on hearsay grounds. *Id.*, 410 U.S. at 292-293. Mississippi at that time did not recognize a hearsay exception for declarations against penal interest, a commonly-applied exception that would have permitted introduction of the testimony. *Id.*, 410 U.S. at 299.

This Court ruled that, under that particular conjunction of circumstances, Chambers was denied "a trial in accord with traditional and fundamental standards of due process." *Id.*, 410 U.S. at 302. Chambers' right to confront and cross-examine McDonald's damaging testimony was impaired by the technical and "unrealistic" application of the "voucher" rule. *Id.*, 410 U.S. at 298. In addition, the testimony regarding McDonald's three oral confessions bore "persuasive assurances of trustworthiness" and because, if accredited by the jury, that testimony would have exculpated Chambers, it was "critical to Chambers' defense." *Id.*, 410 U.S. at 302. Under those limited, rare circumstances, "where constitutional rights *directly affecting the ascertainment of guilt are implicated*," the Court held that "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* (emphasis added).

In *Green*, the defendant on trial for murder was prevented by the hearsay rule from introducing testimony

that another man, Moore, had confessed that he committed the killing and that Green was not present. *Green*, 442 U.S. at 96. As in *Chambers*, because the testimony, if accredited, would have been exculpatory, it was critical to Green's defense. *Id.*, 442 U.S. at 97. Further, the court found that "substantial reasons existed to assume its reliability." *Id.* The foremost reason for finding the excluded hearsay to be reliable was the fact that the State itself "considered the testimony sufficiently reliable to use it against Moore" in earlier convicting Moore of the murder and obtaining a death sentence. *Id.* Following *Chambers*, the Court ruled that exclusion of the testimony denied Green a fair trial. *Id.*

Given the very unusual circumstances in *Chambers* and *Green*, the Court has emphasized that those holdings do "not stand for the proposition that the accused is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." *Scheffer*, 523 U.S. at 316. *Accord*, *Egelhoff*, 518 U.S. at 53 (plurality opinion). The Tennessee court, however, has misapprehended the unique circumstances in *Chambers* and *Green*, where excluded evidence of third-party confessions bore "persuasive assurances of trustworthiness" and were "critical" to the defense because they were directly exculpatory. As a consequence, the Tennessee court's decision in this case has in effect drawn from *Chambers* and *Green* the very proposition that this Court has disclaimed: that exclusion of evidence merely favorable to a defendant, even by operation of a nonarbitrary hearsay rule, violates his right to a fair trial.

First, the Tennessee court overlooked the differences in nature between the evidence at issue in *Chambers* and

Green and the hearsay excluded in this case. In the former cases, the excluded evidence was of confessions by third parties to the very crimes for which the defendants were on trial. In this case, the excluded testimony was that the 11-year-old complainant had earlier told a friend that she had had sex with an adolescent male. The Tennessee court deemed such excluded testimony to be "critical" to the defense because it offered an alternative explanation for the victim's hymenal injury. App. 15-16.

Exclusion of that hearsay did not foreclose the defendant from offering that defense, however. The defendant could have sought leave of court, under Tenn.R.Evid. 412, to cross-examine the complainant herself as to whether she had been sexually active. But the defendant never made such a request. App. 7. It was not the application of the hearsay rule, but rather the defendant's own failure to pursue such questioning of the victim that deprived him of an alternative explanation for the hymenal tear.

Moreover, the excluded evidence of confessions was "critical" to the defense in *Chambers* and *Green* because, if accredited, it would have been completely exculpatory. In contrast, as the dissenting justices below pointed out, the excluded hearsay in this case would not have been truly exculpatory because "even if the victim had engaged in prior sexual activity with an adolescent male she still could have been a victim of rape at the hands of the defendant." App. 39. The excluded hearsay was thus not "critical" to the defense in the same sense as in *Chambers* and *Green*, and for the Tennessee court to deem it so represents an unwarranted expansion of the holdings in those cases.

The Tennessee court continued what it described as its *Chambers* analysis by finding that the excluded evidence "appears to be reliable." App. 16. The court based that finding simply on the fact that the hearsay witnesses were friends of the victim and that there was no showing of animosity or other motive to fabricate. App. 16. The court "buttressed" its finding by analogizing a crime victim's alleged statements to admissions by a party-opponent, which the court characterized as having "inherent reliability." App. 16. In *Chambers* and *Green*, in contrast, the out-of-court declarations were confessions, certainly against the penal interests of the declarants, that would have been admissible had Mississippi and Georgia recognized that common hearsay exception. Here, as even the Tennessee court conceded, there is no commonly-recognized hearsay exception for "admissions" by a crime victim. App. 17.

In any event, the declarations against penal interest in *Chambers* and *Green* carried "persuasive assurances of trustworthiness." *Chambers*, 410 U.S. at 297-298, 301-302. The hearsay in this case – even assuming the existence of the minimal indicia of reliability highlighted by the court – far from bearing "persuasive assurances," instead carried substantial doubts as to reliability. As the dissenters pointed out, the age of the declarant (11 years old) must be considered.

> Children and teenagers may be prone to fabricate or exaggerate both the status of their consensual sexual activity and their sexual prowess. Children may succumb to peer pressure or fabricate stories of sexual promiscuity to be viewed

> as "cool" or "mature." . . . The victim simply may have been attempting to impress a friend.

App. 37.

Indeed, one of the witnesses to the victim's alleged declaration stated "that she did not know if there was any truth to the victim's statements and thought that the victim might have been trying to fit in with older kids." App. 51-52. The record in this case, and common sense, thus raise questions about the veracity of the reported declarations. Without more than a mere lack of ulterior motive by the witnesses, the attribution of reliability to second-hand repetition by one child of another child's boasting of sexual activity defies common experience. More to the point, the Tennessee court's finding of reliability essentially dilutes the "persuasive assurances of trustworthiness" standard of *Chambers* and thus again amounts to an unwarranted expansion of that holding.

Certainly a criminal defendant has a fundamental right to present witnesses in his defense. U.S. CONST. amend. VI, XIV, § 1; *Chambers*, 410 U.S. at 302. This Court has recognized, however, that the defendant's right is not unlimited but is subject to reasonable restrictions. *Scheffer*, 523 U.S. at 308; *Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987). The state and federal governments "unquestionably have a legitimate interest" in promoting fair and accurate fact-finding in criminal trials by excluding unreliable evidence. *Scheffer*, 523 U.S. at 309. Accordingly, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Id.*, 523 U.S. at 308. Among such rules, "perhaps no rule

of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay" with its attendant exceptions for evidence otherwise recognizable as trustworthy. *Chambers*, 410 U.S. at 302.

In exercising his right to present a defense, therefore, a defendant must comply, as must the State, with established rules aimed at assuring fairness and reliability in trials. *Id.* Such rules, grounded in legal history and experience as well as in the states' legitimate interests, do not abridge the defendant's right so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." *Scheffer*, 523 U.S. at 308; *Lucas*, 500 U.S. at 151; *Rock*, 483 U.S. at 56. This Court has thus balanced the important, legitimate interests of the government in ensuring reliability of evidence and the defendant's right to present a defense. In balancing those interests, the Court has found that the defendant's right is abridged only in the rarest, most "unique," and most egregious circumstances, such as when exculpatory third-party confessions bearing "persuasive assurances of reliability" are excluded from evidence. *Chambers*, 410 U.S. at 302-303; *Green*, 442 U.S. at 97.

The Tennessee decision in the present case, by diluting the self-limited standard set forth in *Chambers*, upsets this Court's careful balancing between the defendant's right and the state's traditionally respected authority to establish and implement its own procedures and rules for criminal trials. *See Chambers*, 410 U.S. at 302-303. Though this Court carefully limited its holding in *Chambers*, the Tennessee decision expands *Chambers* into a broadly applicable principle that essentially would require trial

courts to follow two separate sets of evidence rules, one for the defendant and another for the State.

The majority in the court below considered its analysis to be required by its reading of *Chambers*, upon which it relied. This is, therefore, an appropriate case for this Court to dispel confusion and clarify the relationship under our Constitution between a defendant's right to present a defense and the public's interest in ensuring the reliability of fact-finding in criminal trials. *See Egelhoff*, 518 U.S. at 60-61 (Ginsburg, J., concurring).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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APPENDIX

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE, Appellee, v. HOWARD BROWN, Appellant.	FOR PUBLICATION FILED: JANUARY 24, 2000 KNOX COUNTY HON. RAY L. JENKINS, JUDGE NO. E1995-00017-SC-R11-CD

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OPINION

REVERSED AND REMANDED BIRCH, J.

The issue here presented is whether the trial court correctly applied the rape shield rule[1] in excluding testimony about a rape complainant's prior sexual behavior with a person other than the defendant. The trial court excluded the proffered evidence upon a finding that the defendant did not describe the evidence in detail sufficient to satisfy the requirement of Tenn. R. Evid. 412 (d) (1) (iii).[2] In contrast, the Court of Criminal Appeals found no issue in the application of Rule 412 (d) (1) (iii); however, it held that the proffered evidence was properly excluded because it constituted inadmissible hearsay.

We accepted review to address and clarify the overlapping application of the rape shield rule, the rule against hearsay,[3] and the defendant's constitutional right to present a defense.

We conclude that the proffered evidence was proper evidence under the rape shield rule as evidence which tends to "rebut or explain scientific or medical evidence." Tenn. R. Evid. 412 (c) (4) (i). Although we agree with the Court of Criminal Appeals that the proffered evidence transgresses the rule against the introduction of hearsay evidence, we conclude that the evidence should have been admitted to satisfy the defendant's constitutional

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[1] Tenn. R. Evid. 412.

[2] "The motion shall be accompanied by a written offer of proof, describing the specific evidence [sought to be introduced] and the purpose for introducing it."

[3] Tenn. R. Evid. 801-804.

right to present a defense. Accordingly, we reverse the judgment of the Court of Criminal Appeals, vacate the defendant's conviction, and remand this case for a new trial.

I

In February 1992, Howard Brown, the defendant, was indicted upon four counts of sexual abuse of an eleven-year-old family member. The complainant testified that Brown kept her home from school on several occasions in September and October 1991 under the guise that she was ill. While they were alone, he sexually abused her. She reported this abuse to her maternal aunt on December 9, 1991. The aunt then related the abuse allegations to the complainant's mother, who immediately took her daughter to the University of Tennessee Medical Center.

Robert Kelly Dickson, M.D., examined the complainant in the emergency room at the University of Tennessee Medical Center on December 9, 1991. His examination revealed a large, healed tear of the complainant's hymen. He testified that this tear was consistent with forced vaginal penetration. Dickson opined that the tear must have occurred several weeks prior to his examination; he found this condition consistent with the medical history related to him by the complainant.

Prior to trial, Brown filed a motion pursuant to Tenn. R. Evid. 412 (d) (1) requesting permission to introduce evidence regarding the complainant's prior sexual behavior with another male. As stated, Dickson observed a tear in the complainant's hymen which he attributed to forced penetration. Brown sought to use evidence of prior sexual

behavior to provide the jury with an alternative explanation for the complainant's medical condition.[4] This evidence would have tended to rebut the inference that Brown was the perpetrator.

The trial court held a hearing on Brown's Rule 412 motion and determined that the motion failed to specify the proffered evidence in sufficient detail as required by Tenn. R. Evid. 412 (d) (1) (iii). Thus, the trial court ruled that the evidence of the complainant's prior sexual behavior was inadmissible.

Based on the evidence presented, the jury convicted Brown of one count of aggravated rape.[5] Brown appealed the conviction. The Court of Criminal Appeals held that the trial court erred in finding the Rule 412 notice insufficient because the State's response to the notice (that both the complainant and her alleged partner denied a sexual relationship in 1991) shows that the State had sufficient notice of the specific evidence sought to be admitted. However, the court affirmed the exclusion of the evidence on the ground that it constituted inadmissible hearsay evidence.

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[4] At trial, Dickson conceded on cross-examination that the hymenal tear could also have been caused by consensual sexual intercourse with an adolescent male.

[5] For this conviction, Brown was sentenced to twenty years in prison as a Range I, Standard Offender.

II

Tennessee's rape shield rule is embodied in Tenn. R. Evid. 412.[6] The law was enacted to reflect the general view that evidence of prior sexual behavior is irrelevant or, if relevant, has little probative value compared to its prejudicial effect, unless the evidence is within one of the enumerated exceptions. When evidence does fall within one of the enumerated exceptions, it is generally viewed as probative of a material issue without being overly prejudicial. The comment to Rule 412 notes that " . . . this rule strikes a balance between the paramount interests of the accused in a fair trial and the important interests of the sexual assault victim in avoiding an unnecessary, degrading, and embarrassing invasion of sexual privacy." Tenn. R. Evid. 412 advisory comm'n cmts (1991).

Thus, as we stated in *State v. Sheline*, 955 S.W.2d 42, 44-45 (Tenn. 1997), Rule 412 is designed to recognize that intrusions into the irrelevant sexual history of a complaining witness are not only prejudicial and embarrassing but also discourage many complainants from reporting sexual crimes. We also noted in *Sheline* that such evidence can "result in two rape trials at the same time – the trial of the defendant and the trial of the rape victim based on her past sexual conduct." *Id.* at 44.

Rule 412, by its provisions, also "recognizes that[,] despite the embarrassing nature of the proof, sometimes the accused can only have a fair trial if permitted to

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[6] This rule replaced the rape shield statute, Tenn. Code Ann. § 40-17-119 (1991), and now governs the relevance of evidence regarding a rape complainant's sexual history.

introduce evidence of the alleged victim's sexual history." Tenn. R. Evid. 412 advisory comm'n cmts (1991). Thus, Rule 412 is a rule of relevance and is written as a rule of exclusion. Its purpose is to exclude all evidence regarding the complainant's prior sexual behavior unless the procedural protocol is followed and the evidence conforms to the specifications of the Rule.

The provisions of Rule 412 applicable to the evidence proffered in this case state in pertinent part:

> (c) Evidence of specific instances of a victim's sexual behavior is inadmissible unless . . . the evidence is:
>
> (1) Required by the Tennessee or United States Constitution, or
>
> . . .
>
> (4) If the sexual behavior was with persons other than the defendant, [and is offered]
>
> (i) to rebut or explain scientific or medical evidence, or
>
> (ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters. . . .

Tenn. R. Evid. 412(c).

In pertinent part, Brown's Rule 412 motion sought admission of the following evidence:

(1) "[T]he testimony of A.L. and E.G. and others that the complainant had a sexual relationship with a minor named W. S.[7] in 1991 at the time the allegations arose"; and

(2) "[I]mpeachment of the complainant with evidence that she engaged in sexual behavior in South Carolina in 1991."[8]

It is evident from the above offer of proof, and from our thorough review of the record, that Brown sought only to admit the hearsay statements of A.L. and E.G. regarding the complainant's sexual history. It has long been held that the Confrontation Clause of the Sixth Amendment[9] and art. I, § 9 of the Tennessee Constitution[10] provide two protections for criminal defendants: the right to physically face witnesses and the right to cross-examine witnesses. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S. Ct. 989, 998, 94 L. Ed. 2d 40, 53 (1987); *State v. Middlebrooks*, 840 S.W.2d 317, 332 (Tenn. 1992). However, Brown never requested that the trial court, by oral or written motion, allow cross-examination of the complainant regarding her alleged prior sexual behavior with

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[7] Due to the age of these three witnesses, we identify by initials only.

[8] In the offer of proof, no testimony whatsoever was adduced from either of the two witnesses in support of the allegation that the complainant "engaged in sexual behavior in South Carolina in 1991."

[9] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

[10] "That in all criminal prosecutions, the accused hath the right . . . to meet the witnesses face to face." Tenn. Const. art. I, § 9.

W.S. Accordingly, we find that the confrontation clause issues involving cross-examination of the complainant are deemed waived, and they are beyond the reach of this opinion. Tenn. R. App. P. 36(a).

Another right essential to due process is the right "to call witnesses in one's own behalf." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1048, 35 L. Ed. 2d 297, 308 (1973); *State v. Sheline*, 955 S.W.2d at 47. Although we find the confrontation clause issue to be waived, Brown has nevertheless properly preserved the issue of whether he was inappropriately denied the right to present the testimony of certain witnesses. This issue addresses the interaction between the rape shield rule, the rule against hearsay, and the constitutional right to present a defense. As previously stated, the only physical evidence indicating that the complaining witness had had intercourse was supplied by Dickson, an expert witness who testified on behalf of the State. He described a large, healed tear of her hymen which without exception was the result of penetrating trauma to the vagina.

Brown sought to introduce the testimony of A. L. and E. G. The trial court heard the testimony of both witnesses out of the jury's presence. A. L., age eighteen at trial, testified that she observed W. S., an adolescent male, and the complainant engaging in kissing and fondling. E. G., age fifteen at trial, testified that she also observed W. S. and the complainant kissing and fondling. Additionally, E. G. stated that the complainant had mentioned to her "a couple of times" that she had been having sex with W. S.

Brown, in testimony given later, denied that he had any sexual contact with the complainant; he sought to show through these two witnesses that a person other than he was responsible for the complainant's physical condition. This intended purpose for the admission of the evidence comports precisely with Tenn. R. Evid. 412 (c) (4) (i). Its probative value clearly outweighs any unfair prejudice to the complainant. *See* Tenn. R. Evid. 412 (d) (4). Therefore, the proffered evidence satisfies the threshold admissibility requirements of Tenn. R. Evid. 412.

Evidence which meets the requirements of Rule 412 may yet be inadmissible if it runs afoul of other well-established rules of evidence, the most prominent among these being the rule against hearsay. Generally speaking, the rule against hearsay is considered to be a rule of reliability, while Rule 412 is a rule of relevance. This difference ensures that only evidence deemed most relevant and most reliable is appropriate for consideration by the trier of fact.

Although we have deemed the proffered evidence appropriate (at least at the threshold) under Rule 412, the evidence is hearsay because it consists of out-of-court statements offered to prove the truth of the matter asserted. Tenn. R. Evid. 801(c). The evidence does not fall within any of the exceptions to the rule against hearsay, exceptions which are designed to ensure a sufficient indicia of reliability. The evidence is, therefore, inadmissible hearsay under the Tennessee Rules of Evidence. Tenn. R. Evid. 801(c). The defendant contends, however, that exclusion of the proffered hearsay evidence violated his constitutional right to present a defense.

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense which includes the right to present witnesses favorable to the defense. *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S. Ct. 646, 652, 98 L. Ed. 2d 798 (1988); *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1976); *Chambers*, 410 U.S. at 302, 93 S. Ct. at 1049; *Sheline*, 955 S.W.2d at 47. In *Washington v. Texas*, the Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, *he has the right to present his own witnesses to establish a defense*. This right is a fundamental element of due process of law.

388 U.S. at 19, 87 S. Ct. at 1923 (emphasis added). Similarly, in *Chambers*, the Court stated that "the rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers*, 410 U.S. at 295-96, 93 S. Ct. at 1046. The *Chambers* Court emphasized that the denial or "significant diminution" of these rights "calls into question the ultimate integrity of the fact finding process and requires that the competing interest be closely examined." *Id.*; *see also Sheline*, 955 S.W.2d at 47.[11]

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[11] Part of the flaw in the dissent's analysis of the issue in this case results from the dissent's failure to recognize that a

Although "[t]he right to present witnesses is of critical importance . . . it is not absolute. In appropriate cases, the right must yield to other legitimate interests in the criminal trial process." *Chambers*, 410 U.S at 295, 93 S. Ct. at 1046. Specifically, "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* at 302, 93 S. Ct. at 1049.

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defendant has *both* the right to cross-examine witnesses presented by the State *and* the right to present witnesses in his or her own behalf. While the dissent correctly notes that the defendant in this case waived his right to cross-examine the complainant regarding her alleged prior statement about sexual activity with W. S., the dissent fails to recognize that waiver of the right to cross-examine the complainant does not waive the defendant's separate right to present witnesses in his own behalf. The dissent's analysis is also flawed in that it draws no distinction between impeachment evidence and substantive rebuttal evidence. The two types of proof clearly are not equivalent. A jury considers impeachment proof only when assessing the credibility of witnesses. *See State v. Martin*, 964 S.W.2d 564, 567 (Tenn. 1998) (Holder, J.) (citing *State v. Reece*, 637 S.W.2d 858, 861 (Tenn. 1982) for the proposition that prior inconsistent statements may be considered only on the issue of credibility and not as substantive evidence). Therefore, even assuming defense counsel had examined the complainant about the alleged prior statement and offered extrinsic evidence of the statement following a denial by the complainant, the jury would have considered the evidence only when assessing the credibility of the complainant. Therefore, unless the dissent is proposing a change in current Tennessee law, simply following Tennessee Rule of Evidence 613 would not have afforded to the defendant his right to offer substantive rebuttal proof which was crucial to explain the State's medical proof and necessary to establish a defense.

However, these procedural and evidentiary rules of exclusion "may not be applied mechanistically to defeat the ends of justice." *Id.* "Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 1264, 140 L. Ed. 2d 413 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S. Ct. 2704, 2711, 97 L. Ed. 2d 37 (1987)).

The constitutional right to present a defense has been held to "trump" the rule against hearsay in at least two United States Supreme Court decisions. *See Chambers*, 410 U.S. at 302, 93 S. Ct. at 1049. ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."); *Green v. Georgia*, 442 U.S. 95, 97, 99 S. Ct. 2150, 2151, 60 L. Ed. 2d 738 (1979) ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment."); *see also Rock*, 483 U.S. at 44, 107 S. Ct. at 2704 (holding that a defendant's right to present a defense was violated by Arkansas's ban on hypnotically refreshed testimony); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146, 90 L. Ed. 2d 636 (1986) (holding that the defendant's right to present a defense was denied by the exclusion of evidence); *Washington*, 388 U.S. at 14, 87 S. Ct. at 1920 (holding that the defendant's right to present a defense was violated by a statute which prevented co-defendants from testifying for one another and thus precluded the defendant from introducing his accomplice's testimony that the accomplice

had in fact committed the crime). Moreover, the constitutional right to present a defense has been held to "trump" a number of other state and federal rules of procedure and evidence, including rape shield statutes.[12]

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[12] *See Teemer v. State*, 615 So.2d 234, 236 (Fla. Dist. Ct. App. 1993) (holding that the defendant's right to present a defense was violated when the trial court excluded DNA evidence to rebut the state's case and establish the defense of misidentification); *People v. Mason*, 578 N.E.2d 1351, 1353-54 (Ill. App. Ct. 1991) (holding that the defendant's due process right to present a defense was violated when he was not allowed to introduce evidence that would have provided another explanation for the injury to the seven-year-old complainant's hymenal ring); *Douglas v. State*, 797 S.W.2d 532, 534 (Mo. Ct. App. 1990) (finding constitutional error when the prosecution presented expert medical proof of the complainant's hymenal condition and the trial court precluded the defendant from presenting proof to establish that the complainant had engaged in sexual intercourse with another person before the defendant allegedly assaulted her); *State v. Jalo*, 557 P.2d 1359, 1362 (Or. Ct. App. 1976) (concluding that the defendant's confrontation rights were violated when the rape shield law prevented him from proving the complainant's motive to lie about her sexual activity with the defendant); *Commonwealth v. Black*, 487 A.2d 396, 400 (Pa. Super. Ct. 1985) (holding that the defendant's confrontation rights were violated when he was prevented from showing that the complainant accused him of rape to get out of the house so that she could resume sexual activity with another person); *State v. Pulizzano*, 456 N.W.2d 325, 335 (Wis. 1990) (holding that the defendant's constitutional right to present a defense was violated by the trial court's exclusion of defense evidence that the child complainant's sexual knowledge resulted from a previous sexual assault); *Tague v. Richardson*, 3 F.2d 1133, 1139 (7th Cir. 1993) (finding constitutional error when the prosecution presented evidence of hymenal injury and the trial court precluded the defendant from showing that the complainant's father had molested her several times prior to the alleged assault involving the defendant); *United States v. Begay*,

The facts of each case must be considered carefully to determine whether the constitutional right to present a defense has been violated by the exclusion of evidence. Generally, the analysis should consider whether: (1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the interest supporting exclusion of the evidence is substantially important. *See Chambers*, 410 U.S. at 298-301, 93 S. Ct. at 1047-49.[13]

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937 F.2d 515, 523 (10th Cir. 1991) (holding that the defendant's confrontation rights required admission of the complainant's testimony on cross-examination about past sexual activity with a third person and of the physician's testimony about the complainant's condition being consistent with proof that a third person had sexual intercourse with the complainant); *see generally* Annotation, *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R. 4th 283 (1980 & Supp. 1998); Annotation, *Admissibility of Evidence that Juvenile Prosecuting Witness in Sex Offense Case had Prior Sexual Experience for Purposes of Showing Alternative Source of Child's Ability to Describe Sex Acts*, 83 A.L.R. 4th 685 (1991 & Supp. 1998).

[13] Relying upon *Montana v. Egelhoff*, 518 U. S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996), the dissent asserts that *Chambers* has been limited to its facts and announced no principle of law that is generally applicable. The dissent apparently fails to recognize that Justice Scalia's opinion in *Egelhoff*, which purported to limit *Chambers*, did not garner a majority and was joined by only three other justices, Chief Justice Rehnquist and Justices Kennedy and Thomas. While Justice Ginsburg filed a separate opinion concurring in the judgment reached by Justice Scalia's plurality, she expressed absolutely no opinion on *Chambers* and its progeny. However, Justice O'Connor filed a dissenting opinion strongly disagreeing with Justice Scalia's characterization of *Chambers*. Justices Stevens, Souter, and Breyer joined Justice O'Connor in dissent. Two years later a

Applying this test to the facts of this case, we are of the opinion that the hearsay testimony Brown sought to introduce – that the complainant admitted to two friends that she had sexual intercourse with an adolescent male during the same time period the defendant allegedly committed aggravated rape – should have been admitted. As previously stated herein, the testimony Brown sought to introduce was clearly relevant to rebut the State's medical proof of the complainant's physical condition and met the threshold admissibility standard of Tennessee Rule of Evidence 412. Moreover, courts considering similar issues have explained that when proof of hymenal injury is offered in a sexual assault or abuse case involving a child complainant, rebuttal proof of prior sexual experience is particularly critical to the defense since it offers the jury an alternative explanation for the hymenal injury. In the absence of such rebuttal proof, most jurors will presume that the child is sexually innocent and attribute the hymenal damage to the alleged criminal act. *Tague*, 3 F.3d at 1138; *State v. Reinart*, 440 N.W.2d 503, 505

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clear majority of the Court rejected Justice Scalia's characterization of *Chambers* by recognizing that a defendant has a constitutional right to present a defense and by stating that the right is not violated so long as evidentiary rules "are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *Scheffer*, 523 U.S. at 303, 118 S. Ct. at 1264 (quoting *Rock*, 483 U.S. at 56, 107 S. Ct. at 2711). Accordingly, the dissent's suggestion that the United States Supreme Court has limited *Chambers* to its facts and repudiated its holding that a defendant has a constitutional right to present a defense is wholly without merit. While the rule announced in *Chambers* requires fact-specific, case-by-case application, the general principle remains sound.

(N.D. 1989); *State v. Howard*, 426 A.2d 457, 462 (N.H. 1981); *People v. Haley*, 395 N.W.2d 60, 62 (Mich. Ct. App. 1986). Therefore, the proof sought to be introduced in this case was substantially critical to the defense.

Next, though the evidence sought to be introduced is hearsay, it appears to be reliable. Both A.L. and E.G. were friends with the complainant around the time of the alleged incident. Nothing in the record indicates that these witnesses had any animosity toward the complainant or any other motive to fabricate the statement. One of the defense witnesses would have testified that the complainant had twice admitted to her that she [the complainant] had been having sex with an adolescent male. This hearsay proof would have been corroborated by the non-hearsay proof of A.L. and E.G. who were also prepared to testify that they had observed the complainant kissing and fondling the same adolescent male and that they had observed W.S. touching the complainant's breast and buttocks around the time of the alleged criminal incident.[14]

The admissibility of the evidence Brown seeks to offer in this case is buttressed by its similarity to evidence that is presently admissible, under Tenn. R. Evid. 803 (1.2) (A), as an admission by a party opponent. This rule

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[14] We emphasize that the trial court may consider this evidence of sexual behavior outside the presence of the jury for determining the reliability of the victim's statement that she had engaged in sexual intercourse. The only evidence directly relevant to the rebuttal of the state's evidence of injury to the victim's hymen, however, and therefore admissible under the proper analysis, is the victim's statement regarding sexual intercourse.

permits a hearsay declaration which is "the party's own statement in either an individual or a representative capacity" to be entered into evidence. While the State is technically the "party" in a criminal case, the complainant in a criminal case is analogous to a party. Since the hearsay evidence proffered by Brown in this case was the out-of-court statement of the complainant, such testimony is quite similar to hearsay evidence which is currently admissible under Rule 803 (1.2) (A). By so stating, we are not suggesting that the proof in this case should have been admitted as an admission by a party opponent, nor are we holding that the complaining witness in a criminal case is a party for purposes of Rule 803 (1.2) (A). The similarity of the evidence sought to be introduced by the defendant to evidence currently admissible pursuant to a firmly rooted hearsay exception is significant and mentioned because firmly rooted hearsay exceptions have inherent reliability. Therefore, the reliability of the proffered testimony is evidenced, in part, by its similarity to an existing firmly rooted hearsay exception.[15]

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[15] The dissent's suggestion that the excluded evidence more closely resembles a declaration against interest is incorrect. The statement was not at the time of its making, nor is it now, a declaration against the pecuniary, proprietary, or penal interest of the complainant. *See* Tenn. R. Evid. 804 (b) (3) ("A statement *which was at the time of its making* so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability. . . . ") (emphasis added). Moreover, the dissent's assertion that the evidence was admitted in *Chambers* only because the declarant was unavailable to testify is inaccurate. As in this case, the declarant in *Chambers* was present in the courtroom. *See Chambers*, 410 U.S. at 300-01, 93 S. Ct. at 1048.

Furthermore, the dissent's assertion that the evidence is unreliable because "children and teenagers may be prone to fabricate or exaggerate both the status of their consensual sexual activity and their sexual prowess" is a broad generalization that simply finds no support in the record in this case. Rather than relying upon broad generalizations, we prefer to allow a jury to make credibility determinations.

Because the proffered evidence fits within one of the exceptions to the rape shield rule, the interest supporting exclusion of the evidence is based solely on the hearsay rule.[16] The hearsay rule has "long been recognized and respected by virtually every State" and "is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." *Chambers*, 410 U.S. at 298, 93 S. Ct. at 1047. However, given the fact that the evidence sought to be admitted in this case has considerable assurances of reliability and is actually very similar to evidence that is permitted as an exception to the hearsay rule, the State's interest in enforcing the hearsay rule to exclude the evidence is

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[16] It is interesting that some courts, in cases involving an underage rape complainant, have held that the state has no substantial interest in excluding evidence of prior sexual activity under rape shield laws when such evidence is being offered to prove an alternative source of injury. Rape shield laws were intended to exclude evidence that has little probative value but great capacity to embarrass and distract. In child complainant cases, evidence of prior sexual activity offered to rebut the State's medical proof has great probative value and minimal capacity to embarrass or distract since the inquiry is so limited. *See Tague*, 3 F.3d at 1138-39.

substantially less than Brown's compelling interest in presenting the evidence.

Considering the foregoing analysis, we conclude that Brown's constitutional right to present a defense was violated by exclusion of the proffered hearsay evidence. Excluding the proffered evidence essentially deprived Brown of an opportunity to present to the jury critical evidence of an alternative explanation for the complainant's hymenal injury. In the absence of this evidence, the jury no doubt attributed the complainant's physical condition to Brown's alleged criminal conduct. As previously noted, when the prosecution relies upon evidence of a complainant's physical condition in a sexual assault/abuse case involving an underage rape complainant, defense evidence that provides an alternative explanation for the condition is particularly critical. Indeed, the only evidence which made this case more than a pure credibility contest was the State's expert proof of physical injury to the complainant. Significantly, the State's own medical expert conceded on cross-examination that the physical injury he observed was consistent with the complainant engaging in a consensual sexual encounter with an adolescent male. Under such circumstances, depriving the defendant of the right to present critical, reliable hearsay evidence of an alternative explanation for the injury is constitutional error. We are unable to conclude that error was harmless beyond a reasonable doubt in this case. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Howell*, 868 S.W.2d 238 (Tenn. 1993).

Finally, we reiterate that, contrary to the dissent's exaggerated assertion, our holding does not effectively

"abolish our rule against hearsay and potentially abolish other evidentiary rules, such as the rape shield law which as a matter of policy, preclude admissibility of specific and relevant evidence." Our holding is neither novel nor far-reaching. Indeed, Tenn. R. Evid. 412 expressly recognizes that the Constitution may, in certain circumstances, mandate admission of proof that is otherwise inadmissible. We simply apply a long-established rule and hold that when, in a particular case, the rule against hearsay operates to deprive a defendant of his or her right to present relevant and reliable evidence that is critical to establish a defense, the rule against hearsay must yield to the defendant's constitutional right to present a defense.

III

To summarize, we conclude that Brown waived the right to cross-examine the complainant about her prior sexual behavior; therefore, no right under the confrontation clause is implicated. We conclude, also, that the testimony of the complainant's friends about the complainant's sexual history satisfies the relevancy test of our rape shield rule. Although this testimony violates the rule against hearsay, admission of the proof is nonetheless required to satisfy Brown's constitutional right to present a defense. Accordingly, the judgment of the Court of Criminal Appeals is reversed, Brown's conviction is vacated, and the case is remanded for a new trial. Costs shall be assessed against the State.

ADOLPHO A. BIRCH, JR., Justice

CONCUR:

Anderson, C.J.
Drowota, J.

DISSENT:

Holder, Barker, JJ.

DISSENTING OPINION

I agree with the majority's conclusion that the rape shield law does not prohibit evidence of the victim's prior consensual sexual activity when the State has introduced evidence of the injury to the victim's hymen. The defendant then could have introduced admissible, competent, and reliable evidence to show prior sexual activity by simply asking the ***victim*** whether she had prior sexual contact. The defendant's counsel failed to elicit this information from the victim and attempted to "back door" the information via inadmissible hearsay testimony. I depart from the majority's opinion allowing the introduction of the inadmissible hearsay as substantive evidence in lieu of admissible testimony from the declarant who was present at trial to testify.

I disagree with the majority's conclusion that the United States Supreme Court decisions, *Green v. Georgia*, 442 U.S. 95 (1979) (Rehnquist, J., dissenting), and *Chambers v. Mississippi*, 410 U.S. 284 (1973) (Rehnquist, J., dissenting), abrogate a valid and nonarbitrary rule against hearsay evidence and mandate a reversal of this case. The

majority's holding potentially abridges other exclusionary rules such as the rape shield rule and places an extremely onerous burden on trial judges.

The majority has misapplied two extremely narrow United States Supreme Court holdings and has created a new constitutional evidentiary principle merely because an attorney failed to follow established evidentiary procedures that were a prerequisite to admission of the desired hearsay testimony. *See Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) ("Relevant evidence may . . . be excluded on account of a defendant's failure to comply with procedural requirements."); *see also Michigan v. Lucas*, 500 U.S. 145 (1991) (preclusion of evidence concerning the defendant's past sexual relations with victim was no violation where the defendant failed to comply with procedures). Moreover, the majority applies this new constitutional principle in a manner that relieves criminal defendants from complying with rules of evidence and procedure that are designed to ensure both fairness and admission of reliable evidence in criminal trials.

I would limit the application of both *Green* and *Chambers* to the facts of those cases and would apply their holdings to hearsay issues only when the following factors are present: (1) the statement is a declaration against a penal interest; (2) the declarant is unavailable to testify;[1] (3) the statement is a third-party confession to a

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[1] In *Chambers*, the trial judge's application of the voucher rule effectively precluded the declarant from testifying that he had previously confessed to the killing for which Chambers was being tried. Accordingly, the declarant in *Chambers* was

crime in which the confession is substantially corroborated by direct evidence; (4) the veracity or reliability of the statement is not questionable; and (5) the defendant otherwise would be absolutely precluded from introducing the evidence.[2] These are the determinative factors in *Chambers* and *Green*. Moreover, this limitation would be consistent with every jurisdiction having assessed the application of *Chambers* and *Green* to hearsay issues; perhaps most importantly the limitation is consistent with *Egelhoff*, 518 U.S. at 42. The hearsay evidence in the case now before us fails to meet *any* of the above criteria. Accordingly, I would hold that our valid hearsay rule designed to exclude testimony whose trustworthiness is inherently suspect should not be abridged by a due process right to present testimony in this case.

RIGHT TO PRESENT EVIDENCE

The majority erroneously concludes that "[e]xcluding the proffered evidence essentially deprived Brown of an

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unavailable as a witness to provide direct evidence of his previous confessions. *See United States v. MacDonald*, 688 F.2d 224, 232 fn. 13 (4th Cir. 1982) ("One could argue that *Chambers* applies only where the declarant is available" but unavailable to testify.).

[2] The United States Supreme Court placed particular emphasis on the fifth factor, that the defendant was otherwise precluded from introducing the evidence. While the case now before us fails to meet all five elements, it is important to note that our rules of evidence would have allowed the defendant to place this information before a jury had counsel followed proper evidentiary procedure.

opportunity to present to the jury an alternative explanation for the complainant's hymenal injury." I disagree. The victim herself was present and available to testify. When the State made an issue of the hymenal tear, the defendant could have simply asked the victim whether she had previously engaged in sexual activity. The failure to pursue this line of questioning is essentially what deprived Brown of an opportunity to present an alternative theory explaining the hymenal tear.

In response to counsel's failure, the majority fashions a rule which in effect permits a party who fails to comport with established evidentiary procedures to present inadmissible forms of the desired evidence. Moreover, the majority allows hearsay to be considered as substantive evidence even though the hearsay statement would have been admissible only for impeachment purposes had the defendant complied with the rules of evidence. This elevation of the statement to substantive evidence due merely to a failure to comply with evidentiary procedures is illogical. The troubling aspect of this elevation is that the proffered evidence was subject to multiple layers of reliability and evidentiary problems: (1) the victim may have been lying or boasting when she made the statement to third parties; and (2) it is entirely possible that the victim never made this statement to the third-party witnesses. Accordingly, such evidence should not be admissible as substantive evidence.

The right to present relevant testimony is not without limitation. *Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Rock v. Arkansas*, 483 U.S. 44, 54 (1987); *see also United States v. Scheffer*, 523 U.S. 303 (1998). The right to present evidence may in appropriate cases bow to accommodate other

legitimate interests in the criminal trial process. *Lucas*, 500 U.S. at 149. Stated simply, "[t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996).

States are afforded "broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Scheffer*, 523 U.S. at 306. States shall evaluate whether the interests served by evidentiary rules justify the limitations imposed on the defendant's constitutional right to testify. *Rock*, 483 U.S. at 55. Rules of exclusion "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate' to the purposes they are designed to serve." *Scheffer*, 523 U.S. at 306, *citing Rock*, 483 U.S. at 55.

The rule against hearsay is predicated on the notion that untrustworthy evidence should not be presented to a trier of fact. *See Egelhoff*, 518 U.S. at 42 ("Hearsay rules . . . prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable."). Out-of-court statements are traditionally excluded because those statements "lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury." *Chambers*, 410 U.S. at 299. Accordingly, the Constitution should not be interpreted in a manner that relieves a defendant from compliance with

rules of evidence and procedure that are designed to ensure both fairness and reliability. *Id.* at 302.

CASES CITED BY MAJORITY

The majority cites the following cases for the proposition that the "constitutional right to present a defense has been held to 'trump' a number of other state and federal rules of procedure and evidence including the prohibition of the state rape shield statutes": *State v. Jalo,* 557 P.2d 1359 (Or. Ct. App. 1976); *Commonwealth v. Black,* 487 A.2d 396 (Pa. Super. Ct. 1985); *Tague v. Richardson,* 3 F.3d 1133 (7th Cir. 1993); *United States v. Begay,* 937 F.2d 515 (10th Cir. 1991). These cases are readily distinguishable from the case now before us and did not involve issues concerning hearsay evidence.

The cited cases hold that evidence generally precluded by a rape shield law may be admissible if the State either opens the door for admission of the evidence or if the evidence is offered for purposes other than to show the victim's moral defect or consent. *See generally Jalo,* 557 P.2d at 1361 (motive); *Black,* 487 A.2d at 400 (bias or motive). The State may open the door for evidence concerning a victim's prior sexual behavior by presenting expert evidence of an injured hymen or other evidence indicating that a victim has been sexually penetrated. *See generally Tague v. Richardson,* 3 F.3d 1133 (7th Cir. 1993); *United States v. Begay,* 937 F.2d 515 (10th Cir. 1991). The key distinction between these holdings and the case now before us is that the proffered evidence of prior sexual contact in the above cases was precluded only by the rape

shield laws but was *otherwise admissible* under the general rules of evidence.

The majority's conclusion that the defendant was denied a right to present testimony of an alternative theory explaining the hymenal tear may have been correct pursuant to the above cases if, and only if, the defendant was prohibited, once the condition of the hymen was made an issue, from asking the victim in this case on cross-examination whether she had previously had consensual sexual contact. The mere fact that evidence is not precluded by a rape shield law does not automatically entitle the defendant to present the evidence in a rape trial. The evidence must still otherwise be admissible. Accordingly, the above-cited holdings would not allow admission of inadmissible hearsay and are limited to otherwise *admissible* evidence being admitted under narrow exceptions to the rape shield laws.

UNITED STATES SUPREME COURT DECISIONS

The majority opinion cites two United States Supreme Court decisions, *Green v. Georgia*, 442 U.S. 95 (1979) (Rehnquist, J., dissenting), and *Chambers v. Mississippi*, 410 U.S. 284 (1973) (Rehnquist, J., dissenting), for the proposition that "the constitutional right to present a defense has been held to 'trump' the rule against hearsay." Both *Green* and *Chambers*, however, merely mandated exceptions to Georgia's and Mississippi's rules against hearsay for declarations made against a penal interest. *See Rock v. Arkansas*, 483 U.S. 44, 53 (1987) (noting Court in *Chambers* "invalidated State's hearsay rule . . . "). Both holdings were narrowly tailored and

premised on the "unique" circumstances of each case. *Green*, 442 U.S. at 97; *Chambers*, 410 U.S. at 1048-49.

The majority cites *Green* for the proposition that "[r]egardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment." *Green*, 442 U.S. at 97. *Green*, however, is readily distinguishable from the case now before us. In *Green*, the defendant ("Green") and a co-defendant ("Moore") were both indicted for the rape and murder of a victim. Moore was tried separately and sentenced to death. During Moore's trial, the State introduced the testimony of a Thomas Pasby. Pasby testified that Moore had confided to Pasby that Moore had killed the victim. Moore informed Pasby that he shot the victim twice after ordering Green to run an errand.

Green was subsequently convicted by a jury of murder. A second trial was conducted to determine whether Green should be sentenced to death. During the sentencing trial, Green attempted to introduce Pasby's testimony to show that Green was not present when the victim was killed and that Green had not participated in the victim's death. When the case was tried, Georgia recognized an exception to the hearsay rule for declarations against pecuniary interest but not for declarations against penal interest. Accordingly, the trial court held that Pasby's testimony constituted inadmissible hearsay and refused to allow Green to introduce the evidence.

The United States Supreme Court granted certiorari and held that under the facts of *Green* the exclusion of

Pasby's testimony constituted a violation of the Due Process Clause of the Fourteenth Amendment. The basis for the Supreme Court's ruling was that the absence of an exception to the hearsay rule for declarations against penal interest precluded Green from proffering relevant evidence even though "substantial reasons existed to assume its reliability." *Id.* at 97.

In *Green*, the Court was particularly troubled by the "unique circumstances" of *Green*. *Id.* at 97. Pasby's testimony was admissible in Moore's trial and the State "considered the testimony sufficiently reliable to use it against Moore, and to base [Moore's] sentence of death upon it." *Id.* Moore's statement to Pasby was a spontaneous confession to a close friend. The evidence corroborating the confession was ample. *Id.* The confession was against Moore's interest, and there was no reason to believe that Moore had any ulterior motive in making the confession. Under these unique circumstances, the Court held that "the exclusion of Pasby's testimony denied the Petitioner a fair trial on the issue of punishment." *Id.*

Similar to *Green*, the United States Supreme Court in *Chambers v. Mississippi*, 410 U.S. 284 (1973), was confronted with a defendant's inability to introduce evidence that a third person had repeatedly confessed orally to committing the murder with which the defendant was charged. When Chambers was tried, the Mississippi Rules of Evidence did not recognize an exception to the hearsay rule for declarations against penal interest and

adhered to the common law "voucher rule."[3] The Supreme Court held that the exclusion of the evidence constituted a violation of the Due Process Clause of the Fourteenth Amendment. As in *Green*, the Court seemed troubled by Mississippi's absence of an exception to the rule against hearsay which would allow introduction of a declaration against penal interest when the declaration was exculpatory and "bore persuasive assurances of trustworthiness." *Id.* at 302.

In *Chambers*, the Court explicitly noted that the third party's confessions "were originally made and subsequently offered at trial under circumstances that provided considerable assurances of their reliability." *Id.* at 300. The third party confessed to three different individuals. The confessions were made spontaneously and to close acquaintances shortly after the murder occurred. The confessions were corroborated by substantial independent evidence. The declarant did not stand to benefit from disclosing his role in the murder, and the declarant was present in the courtroom and could have been cross-examined under oath. *Id.* at 300-01.

The Court briefly noted that a rationale for the rule against hearsay is to exclude untrustworthy testimony. *Id.* at 298. Where the testimony bears persuasive assurances of trustworthiness and the testimony is exculpatory in nature, the hearsay rule should "not be applied mechanistically to defeat the ends of justice." *Id.* at 302. Accordingly, *Chambers* effectively held that stringent application

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[3] This rule prevents a party from impeaching its own witness; its corollary is that a party calling a witness is bound by anything the witness might say.

of the rule against hearsay may violate fundamental standards of due process when the rule is applied mechanistically and in a manner precluding introduction of statements against penal interest that are both reliable and "directly affecting the ascertainment of guilt." *Id.*

The crux of the *Chambers* and *Green* decisions is that a defendant has a fundamental right to present *reliable* evidence of a third party's confession to a crime for which the defendant is being tried. Evidence of a spontaneous confession by a third party that is corroborated by direct evidence satisfies a showing of "particularized guarantees of trustworthiness" and is sufficiently reliable to be admissible as an exception to the rule against hearsay. *State v. Bunyan*, 712 A.2d 1091, 1094 (N.J. 1998). A child's off-hand and perhaps boastful remarks, however, to other children concerning the child's sexual prowess lack the particular guarantees of trustworthiness indicative of statements generally admissible under the exceptions to the hearsay rule.

LIMITATION OF *CHAMBERS* AND *GREEN*

The majority holds that the defendant was denied the opportunity to present a defense pursuant to *Chambers* because hearsay evidence relating to an element of the State's case was excluded. The majority, however, fails to recognize the limited application of *Chambers* articulated in subsequent Supreme Court decisions.

In *Montana v. Egelhoff*, 518 U.S. 37 (1996), a plurality of the Court noted the limited application of *Chambers* by stating:

> the holding of Chambers – if one can be discerned from such a fact-intensive case – is certainly not that a defendant is denied "a fair opportunity to defend against the State's accusations" whenever "critical evidence" favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to a level of a due process violation.

Id. at 53. The limitation on *Chambers* was subsequently confirmed by an eight-Justice majority, excluding Justice Stevens, in *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261 (1998). In *Scheffer*, eight Justices agreed that "*Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case." 118 S. Ct. at 1268. Both state and federal courts that have been confronted with *Chambers* have explicitly limited *Chambers* and *Green* to the facts of those cases. *See Welcome v. Vincent*, 549 F.2d 853, 857 (2nd Cir. 1977); *Little v. Johnson*, 162 F.3d 855 (5th Cir. 1998) ("In *Montana v. Egelhoff*, the Supreme Court explained, '[T]he holding of Chambers – if one can be discerned from such a fact-intensive case . . . ' "); *Barefoot v. Estelle*, 697 F.2d 593, 597 (5th Cir. 1983) ("We think that *Green* is limited to its facts. . . . "); *Maness v. Wainwright*, 512 F.2d 88, 91 (5th Cir. 1975) (recognizing factual limits on *Chambers* holding); *McGinnis v. Johnson*, 181 F.3d 686, 693 (5th Cir. 1999); *Gacy v. Welborn*, 994 F.2d 305, 316 (7th Cir. 1993); *United States v. Fowlie*, 24 F.3d 1059, 1069 (9th Cir. 1994) (noting that *Chambers* was based on addressing antiquated rules of evidence that precluded admission of a third party's confession); *Jones v. State*, 709 So.2d 512, 524 (Fla. 1998) (noting that *Chambers* was "limited to its facts due to the peculiarities of Mississippi evidence law

which did not recognize a hearsay exception for declarations against penal interest."); *Gudinas v. State*, 693 So. 2d 953, 965 (Fla. 1997) (limiting *Chambers* to "its facts due to the peculiarities of Mississippi evidence law which did not recognize a hearsay exception for declarations against penal interest."); *State v. Bunyan*, 712 A.2d 1091, 1095 (N.J. 1998).

Because it is clear that the application of both *Chambers* and *Green* should be limited to the facts of those cases when applied to issues involving hearsay evidence, this Court should have examined the facts of those cases. Both *Chambers* and *Green* involved: (1) declarations against a penal interest; (2) hearsay statements in which the declarant was unavailable to testify; (3) third-party confessions to a crime that were substantially corroborated with direct evidence; (4) hearsay statements in which the veracity or reliability of the statement was not questionable; and (5) situations in which the defendant would otherwise absolutely have been precluded from introducing the evidence. I read factor (5) as being the key consideration by the Court in both *Chambers* and *Green*. *See also Gacy v. Welborn*, 994 F.2d 305, 316 (7th Cir. 1993) (noting challenge would lie if evidentiary rules were "to blot out a substantial defense" and direct evidence of the defense was unavailable). While both *Chambers* and *Green* are readily distinguishable from the case now before us because direct evidence was available to the defendant to establish the defense, I will also address the applicability of each of the remaining factors.

Declarations Against Penal Interest

Both *Chambers* and *Green* involved hearsay testimony that should have been admissible as a declaration against the declarant's penal interest. The majority is now applying *Chambers* to a hearsay statement it classifies as a party opponent admission. The majority, however, is unable to cite any authority for applying *Chambers* and *Green* to issues involving hearsay statements other than statements against interest. Courts having previously considered the application of *Chambers* to other classifications of hearsay have not only declined to extend *Chambers* but have also refused to extend *Chambers* to cases involving statements by a party. *See Gacy*, 994 F.2d at 316 (refusing to apply *Chambers* to party admissions).

While the majority's classification of the hearsay statement is beyond the ambit of *Chambers* and *Green*, I believe that the majority erroneously equates the hearsay in this case to a party opponent admission. The majority reaches its conclusion by referring to the victim as a "party." Again, the majority does not cite any law in support of this reasoning. Moreover, the majority's position is inconsistent with both Tennessee law and other jurisdictions that have addressed the issue and held that a victim is not a party to a criminal proceeding. *See City of Chattanooga v. Swift*, 442 S.W.2d 257, 258 (Tenn. 1969) (defining the term "party" as meaning "one having a right to control proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from judgment.").

A victim in a sexual assault case is not a party for purposes of a party opponent admission. In *State v. Antillon*, 426 N.W.2d 533 (Neb. 1988), the defendant in a child sexual assault case attempted to introduce hearsay statements of the victim. In *Antillon*, the court addressed whether hearsay evidence of a victim's statement was admissible as a statement of a party. The court held that a sexual abuse victim was not party to the criminal proceeding because the victim did not possess the right "to control the proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the judgment." *Id.* at 538 (citing *City of Chattanooga v. Swift*, 442 S.W.2d 257 (Tenn. 1969); *Gibbons v. Belt*, 33 N.W.2d 374 (Iowa 1948)). Moreover, the common rationales present for admitting statements of a party are inapplicable to the victim of a crime.

I, therefore, disagree with the majority's assertion that a child victim to a sexual assault crime is or should be treated in the same manner as a party for purposes of a party opponent admission. The victim in this case did not possess the right "to control the proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the judgment." *See City of Chattanooga*, 442 S.W.2d at 258.

Declarant Unavailable to Testify

In both *Chambers* and *Green*, the declarants, i.e., the third parties confessing to the crimes for which Green and Chambers were being tried, were unavailable to testify. Had the declarants been available to testify, the hearsay evidence would likely have been properly excluded.

See Gacy, 994 F.2d at 316 (holding when direct evidence is available the constitution does not provide "an accused the privilege of proffering, through hearsay, his self-serving statements. . . . "). A declarant must be unavailable to testify for the declaration against penal interest exception to be applicable.

As noted in the previous section, the victim in this case was a non-party. The declarations against interest exception applies to non-parties. Accordingly, the majority should have analyzed this issue under the exception for declarations against interest. While such an analysis would have met one of the factors of *Chambers* and *Green*, the hearsay exception would not apply as the declarant *was* available to testify. *State v. Dicks*, 615 S.W.2d 126, 129 (Tenn. 1981); *Smith v. State*, 587 S.W.2d 659, 661 (Tenn. 1978).

Corroboration or Reliability

The majority also concludes that because the victim was "analogous to a party" the victim's out-of-court statement was reliable because "such testimony is quite similar to hearsay evidence which is currently admissible under Rule 803(1.2)(A)." This logic is circular and assumes reliability without examining the content of the statement.

The defendant attempted to proffer hearsay evidence that the eleven-year-old victim had stated that she had previously engaged in sexual intercourse with an adolescent male. In examining the potential veracity or reliability of this statement, one must examine both the content of the statement and the context in which the

statement was made. Moreover, one must also consider the age of the declarant in this case.

Children and teenagers may be prone to fabricate or exaggerate both the status of their consensual sexual activity and their sexual prowess. Children may succumb to peer pressure or fabricate stories of sexual promiscuity to be viewed as "cool" or "mature." The mere fact that the victim was a rape victim does not automatically render the victim's hearsay allegations of sexual promiscuity with an adolescent male reliable. The victim simply may have been attempting to impress a friend.

The majority further asserts the hearsay statement was "corroborated by the non-hearsay proof" that a defense witness observed the victim kissing and fondling the adolescent male. This evidence is analogous to evidence that the rape shield rule was designed to prohibit. That the victim consented to "kissing and fondling," if true, would not indicate that the victim consented to or did have sexual intercourse with either the adolescent male or the defendant. This evidence corroborates nothing except the fact that the victim had an adolescent boyfriend.

In both *Chambers* and *Green*, the Court went through numerous factors that supported persuasive assurance of trustworthiness concerning the hearsay statements. In both cases the declarants had confessed to committing the criminal acts for which the defendants were being tried. The declarant's statements were admissible against the declarants. In *Green*, the declarant's statement was sufficiently reliable to use against the declarant and to impose a sentence of death. Moreover, considerable direct

evidence corroborated the declarants' confessions in *Chambers* and *Green* whereas the corroborating evidence in the case now before us is ***at best*** circumstantial in nature and is irrelevant to the crime charged.[4]

Preclusion from Presenting Exculpatory Evidence

Of primary concern to the Court in both *Chambers* in [sic] *Green* was that the absence of a hearsay exception for declarations against a penal interest precluded the defendants from introducing reliable evidence that others had confessed to committing the crimes for which the defendants were being tried. Such evidence, if believed by a jury, could have the effect of exonerating a defendant in a criminal proceeding. Accordingly, the Court in both *Chambers* and *Green* effectively created exceptions to Georgia's and Mississippi's rules against hearsay for declarations against penal interest due to: (1) the exculpatory nature of the third parties' confessions; (2) the confessions' persuasive assurances of trustworthiness; and (3) the lack of an evidentiary rule allowing a defendant to introduce evidence of a party's confession to the crime charged.

Unlike the defendants in either *Chambers* or *Green*, the defendant in the case now before us was not precluded by the Tennessee Rules of Evidence from introducing evidence of the victim's statement. Pursuant to

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[4] Proper "corroborating evidence" in the case now before us would have been evidence that the witness actually viewed the victim having intercourse with the adolescent male, thereby directly corroborating the veracity of the hearsay statement.

Tennessee Rule of Evidence 613 the defendant's counsel could have simply elicited from the victim whether she had ever told anyone that she had previously had sexual contact with an adolescent male. The victim could have then either admitted making the statement and explained the content or the circumstances surrounding the statement or the victim could have denied making the statement. If the victim denied making the statement, the defendant could have then introduced the hearsay evidence for impeachment purposes pursuant to Tennessee Rule of Evidence 613. *See State v. Martin*, 964 S.W.2d 564 (Tenn. 1998). The defendant, however, did not follow the established procedure in Tennessee for introducing this type of evidence. Moreover, the statement was not truly exculpatory in the sense that even if the victim had engaged in prior sexual activity with an adolescent male she still could have been a victim of rape at the hands of the defendant.

BURDEN ON TRIAL COURTS

While the majority has not clearly articulated the precise new hearsay exception created by this case, the exception would appear to be as follows:

> The rule against hearsay may be abridged whenever the rule against hearsay excludes evidence that may negate an essential element of the State's case thereby impeding a defendant's ability to present a complete defense.

Such a broad holding is dangerous precedent and places trial judges in a "Catch-22" situation. Hearsay evidence is

generally relevant evidence proffered to negate an element of the State's case. The preclusion of *any* evidence that tends to negate an element of the State's case impedes a defendant's ability to present a defense. Accordingly, the majority's analysis and its failure to articulate a precise and narrow exception to be applied in similar cases effectively abolish our rule against hearsay and potentially abolish other evidentiary rules such as the rape shield law which, as a matter of policy, preclude admissibility of specific and relevant evidence.

Trial judges may now face a difficult task in deciding the admissibility of generally inadmissible evidence. Trial judges in a criminal proceeding when faced with proffered hearsay evidence must: (1) decide whether the evidence is hearsay; (2) decide whether the evidence is admissible as an exception to the rule against hearsay; and (3) determine whether the hearsay evidence negates an element of the State's case. If the trial judge admits the hearsay, the trial judge may have committed error by allowing introduction of inadmissible evidence. If the trial judge precludes the hearsay, the trial judge, according to the majority, may have committed reversible error by impeding the defendant's right to present a case. Accordingly, the trial judge faces potential error regardless of the evidentiary ruling. Furthermore, the trial court has neither the appellate court's benefit of hindsight nor a complete trial record with which to determine whether the error of admitting or the error of excluding is egregious error or harmless error.

CONCLUSION

Chambers and *Green* did not technically "trump" a valid rule against hearsay evidence. Both cases operated to create a clearly enunciated and recognized exception to the hearsay rule for declarations against a penal interest. The majority in the case now before us does not create a narrow and ***recognized*** exception to the rule against hearsay for a specific type of testimony or evidence. Absent an articulation of a new exception to the rule against hearsay, the majority has strayed from the analysis in *Chambers* and *Green*. Moreover, absent a recognized and articulated exception, the majority is creating an amorphous rule that will abridge an established hearsay rule precluding admission of unreliable and untrustworthy evidence.

The proper procedure in the case now before us would have been for trial counsel to ask the victim whether she had ever told anyone that she had previously engaged in consensual sexual activity. Counsel did not do so. Trial counsel, not the trial court, essentially deprived Brown of the opportunity to present an alternative explanation to the jury.

The rule this Court fashions today allows an inadmissible hearsay remark to be introduced and treated as substantive evidence regardless of the veracity of the remark. The testimony in question would not have risen to the level of substantive evidence had defense counsel followed evidentiary procedures. This inconsistency is precisely why Tennessee Rule of Evidence 613 exists and why such evidence should be subject to our established procedure. I, therefore, believe that this Court need not

invoke the narrow due process right to present third-party confessions articulated in *Chambers* and *Green* merely because trial counsel in the case now before us failed to follow established procedure. *See Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (stating relevant evidence may be excluded "on account of a defendant's failure to comply with procedural requirements"). While the majority's result in this case may be desirable, the means to accomplish this desired result at this stage of the proceedings defies precedent and undermines our evidentiary policies of assuring reliable and trustworthy evidence.

For the foregoing reasons, I respectfully dissent.

I am authorized to state that Justice Barker joins in this dissenting opinion.

JANICE M. HOLDER, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,	)	Appeal
Appellee,	)	No. E1995-00017-SC-R11-CD
v.	)	
HOWARD BROWN,	)	Knox County No. 46657
Appellant.	)	Judgment of the Court of Criminal Appeals is REVERSED; case is REMANDED to the trial court for a new trial.

JUDGMENT ORDER

(Filed Jan. 24, 2000)

This cause came to be heard upon briefs, argument of counsel, and the record on appeal from the Court of Criminal Appeals.

The Court is of the opinion that evidence proffered at the trial court was proper evidence under the rape shield rule as evidence which tends to "rebut or explain scientific evidence." Tenn. R. Evid. 412 (c) (4) (i). The Court is further of the opinion that although the proffered evidence transgressed the rule against hearsay, it should have been admitted to satisfy the defendant's constitutional right to present a defense. In accordance with the opinion filed herewith, it is therefore, ORDERED and ADJUDGED by this court that the judgment of the court of Criminal Appeals is reversed, the defendant's conviction is vacated, and this case is remanded to the trial court for a new trial.

Costs of the appeal are taxed to the appellee for which execution may issue if necessary.

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT KNOXVILLE

STATE OF TENNESSEE,	) No. 03C01-9505-CR-00139
Appellee,	) Knox County, No. 46657 below
v.	)
HOWARD BROWN, ALIAS, DUNKER,	) Aggravated Rape
	) AFFIRMED
Appellant.	)

JUDGMENT

(Filed Dec. 11, 1997)

Came the defendant, Howard Brown, alias, Dunker, by counsel, and the state, by the Attorney General, and this cause was heard on the record on appeal from the Criminal Court of Knox County; and upon consideration thereof, this court is of the opinion that there is no reversible error in the judgment of the trial court.

It is, therefore, ordered and adjudged that the judgment of the trial court is affirmed and the case is remanded to the Criminal Court of Knox County for the execution of judgment and the collection of costs accrued below.

It appearing that the defendant, Howard Brown, Alias, Dunker, is indigent, the costs of the appeal are taxed to the State of Tennessee.

Joseph M. Tipton, Judge

Gary R. Wade, Judge

John K. Byers, Senior Judge

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1995 SESSION

STATE OF TENNESSEE,	)	No. 03C01-9505-CR-00139
Appellee,	)	Knox County
v.	)	Honorable Ray Lee
HOWARD BROWN, ALIAS, DUNKER,	)	Jenkins, Judge
	)	(Aggravated Rape)
Appellant.	)	

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OPINION FILED: DEC 11 1997

AFFIRMED
Joseph M. Tipton
Judge

OPINION

The defendant, Howard Brown, alias, Dunker, appeals from his conviction in the Knox County Criminal Court for aggravated rape, a Class A felony. He was sentenced as a Range I, standard offender to twenty years to be served in the custody of the Department of Correction. In this appeal as of right, the defendant contends:

> (1) that this case should be remanded for the trial court to determine if the indictment charges an offense,
>
> (2) that the trial court erred in excluding admissible evidence of the victim's sexual relationship with an adolescent male that was offered to rebut medical testimony under Tenn. R. Evid. 412,
>
> (3) that the trial court erred in supplementing its instructions to the jury relative to the election of offenses after the jury had begun deliberations, and
>
> (4) that the trial court erred in allowing the jury to resume deliberations after declaring a mistrial,
>
> (5) that the trial court erred in refusing the defendant's request for individual polling of jurors.

We find no reversible error and affirm the conviction.

The facts in this case involve the defendant having sexual intercourse with his step-daughter, who was less

than thirteen years old. The victim testified that she was eleven years old and in the sixth grade when the defendant began touching and kissing her. She stated that the first conduct occurred on a day that the defendant kept her home from school. She said that the defendant took her to her mother's room where he had her perform oral sex and he performed oral sex on her. Later that same day, she testified that the defendant again forced her to perform oral sex on him. On another day, she said that the defendant came to her bedroom, took off her clothes and placed his penis inside her. She said that he stopped when she complained that he was hurting her stomach. On a third occasion, the defendant took the victim to her mother's bedroom and began fondling her, ultimately having sexual intercourse with her. The victim reported that the incidents occurred early in the school year. The victim testified that she reported the abuse on December 9, 1991, by telling her aunt who then told her mother.

Janie Shelton, the victim's aunt, testified that the victim told her on December 9, 1991, that the defendant had sexually abused her. She said that she immediately told the victim's mother. She said that the victim was hysterical when taken to the hospital. On cross-examination, she said that the victim's mother guessed who had abused her daughter.

Nancy Moore, the victim's sixth grade teacher, testified that the victim missed two days of school in September, five days in October and one day in November. She described the victim as an honest and capable student, but she said that she noticed a change in the victim's attitude after her October absences.

Robert Kelly Dickson, an emergency room pediatrician with the University of Tennessee Hospital, testified that he examined the victim on December 9, 1991. He said that the victim could not tell him how many times the abuse had occurred. He said that the victim told him that nothing had happened in the last month leading up to her report. He noted one large healed tear of the victim's hymen that had occurred several weeks prior to the examination. He stated that the victim's condition was consistent with forced vaginal penetration and consistent with the history given by the victim.

The defendant presented the testimony of one of the victim's friends, Elesha Gibson, who testified that the victim and she had skipped school together on one occasion. She also said that the victim complained to her that the defendant was too strict.

The defendant testified that he was twenty years old when he met the victim's mother. He said that they married in October 1990 and began living in the Bakertown Apartments where he was a maintenance man. He said that he had disciplined the victim after catching her with an older boy in the fall of 1991. He denied that any abuse occurred. On cross-examination, he admitted that he and the victim had been alone in the apartment several times.

I

The defendant has filed a motion with this court asking that we remand the case to the trial court for the determination of the sufficiency of the indictment in light of this court's holding in *State v. Roger Dale Hill, Sr.*, No.

01C01-9508-CC-00267, Wayne County (Tenn. Crim. App. June 20, 1996), dealing with the *mens rea* element of the offense not being specified in the allegations. However, our supreme court reversed this court in *Hill* and concluded that an allegation that the defendant unlawfully sexually penetrated the victim would suffice. *State v. Roger Dale Hill, Sr.*, No. 01-S-01-9701-CC-00005, Wayne County (Tenn. Nov. 3, 1997) (for publication).

In any event, the indictment in the present case alleges that the defendant "unlawfully and *feloniously* did sexually penetrate" the victim. (Emphasis added). The Tennessee Supreme Court has previously held that the term "feloniously" means "with a deliberate intent to commit a wrongful act" and, thus, includes intentional acts. *State v. Smith*, 119 Tenn. 521, 526, 105 S.W. 68, 70 (1907). Under present law, the element of recklessness, that is required for aggravated rape, is also established if a person acts intentionally or knowingly. *See* T.C.A. § 39-11-301(a)(2). Thus, the term "feloniously" as alleged in the indictment actually specifies the *mens rea* necessary for aggravated rape. The indictment is sufficient.

II

The defendant contends that the trial court erred by excluding admissible evidence of the victim's sexual relationship with an adolescent male that was offered by the defendant to rebut medical testimony under Rule 412, Tenn. R. Evid. The state argued that the defendant's motion failed to specify sufficiently the proof sought to be admitted and the reason for its admission. Following a hearing and the defendant's offer of proof, the trial court

granted the state's motion to exclude the evidence based upon the insufficiency of the notice.

Rule 412 allows the admission in an aggravated rape trial of specific instances of conduct relative to the victim's sexual behavior with persons other than the defendant if offered to rebut or explain medical or scientific testimony. Tenn. R. Evid. 412(c)(4)(i). However, the defendant must submit a written motion no later than ten days before trial unless the evidence is newly discovered or relates to a newly arisen issue. Tenn. R. Evid. 412(d)(1)(i). The motion must be served on all parties and must be accompanied by a written offer of proof that describes the specific evidence and the purpose of its admission. Tenn. R. Evid. 412(d)(1)(ii) and (iii).

The record reflects that the defendant complied with the filing time limit. Also, it is apparent that the state had sufficient notice of the specific evidence sought to be admitted by its assertions that both the victim and her alleged partner were available to deny that they had had a sexual relationship in 1991. Therefore, we conclude that the trial court should not have excluded the evidence due to any insufficiency in the notice to the state. However, we do conclude that the evidence should have been excluded because it constituted inadmissible hearsay evidence as it was. The defendant's offer of proof consisted of the testimony of Elesha Gibson and Amanda Love, both of whom testified that the victim told them that she was having a sexual relationship with another adolescent in the apartment complex. Both witnesses acknowledged that they had never witnessed any sexual activity between the victim and her alleged partner. One also stated that she did not know if there was any truth to the

victim's statements and thought that the victim might have been trying to fit in with older kids. This evidence is hearsay when offered as truth to rebut the medical testimony. Therefore, the evidence was properly excluded.

III

The defendant contends that the trial court erred in supplementing its instructions to the jury after the jury had begun deliberations relative to the election of offenses. The record reflects that the state elected the specific instances upon which it would rely at the close of the state's proof but outside the presence of the jury. The trial court neglected to instruct the jury on the election of offenses and the requirement of jury unanimity in its initial instructions. The jury began deliberations late in the afternoon and when deliberations resumed the following day, the trial court, *sua sponte*, delivered the supplemental instructions relative to the election of offenses. Included in these instructions was the admonishment that the supplemental instructions not be given any greater weight than those previously given.

The trial court is required to give a complete charge of the law applicable to the facts of the case. *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986). In order to insure jury unanimity, when the facts of a case could implicate several offenses, the trial court is required to instruct the jury regarding the election of the specific offense upon which the state is relying for a conviction. *State v. Shelton*, 851 S.W.2d 134, 136-37 (Tenn. 1993). Also, it is within the trial court's discretion to recall a jury for supplemental instructions. *Burton v. State*, 217 Tenn. 62,

70, 394 S.W.2d 873, 876 (1965). In this case, the failure of the trial court to charge the jury relative to the election of offenses would have been error. Furthermore, the trial court correctly admonished the jury not to place any undue emphasis on the supplemental charge and to consider it in conjunction with the entire charge. Therefore, we conclude that the trial court did not err in instructing the jury, *sua sponte*, after deliberations had begun.

IV

The defendant contends that the trial court erred in allowing the jury to resume deliberations after declaring a mistrial. The defendant argues that the trial court placed undue pressure upon the jury to arrive at a verdict. The state responds that it was not error to continue deliberations when the jury indicated that progress was being made and that a verdict could be reached.

On the first day of deliberations, the jury began deliberating at 3:20 p.m. Deliberations resumed the next morning after the trial court issued additional instructions regarding the election of offenses and jury unanimity. At 11:17 a.m., the jury returned to the courtroom and the following exchange took place:

> THE COURT: All right. Members of the jury, who is your foreman? Yes, sir. Have you reached a verdict?
>
> THE FOREMAN: No, sir.
>
> THE COURT: All right. Let me ask you this. Do you feel that there is any possibility of reaching a verdict?
>
> THE FOREMAN: No, sir.

THE COURT: Do you feel that you are deadlocked?

THE FOREMAN: Yes, sir.

THE COURT: All right. Is that the consensus of the jury? All right. It seems to be. All right – all right. Enter a mistrial. These things happen. Don't let it bother you. We appreciate your service. You've been away from family –

JUROR NO.3: What does that mean when you have a mistrial?

THE COURT: That means that no verdict is entered. Your verdict must be unanimous, as I instructed you.

JUROR NO.9: We – we just feel we need more time.

THE COURT: Do you think you can reach a verdict?

JUROR NO.9: I think we can.

A JUROR: It's possible.

THE COURT: All right – all right. Then – if you can reach a verdict, that's what I need to know. You think you can?

A JUROR: We're getting real close.

THE COURT: All right. Well, that's fine. If you're making progress, I don't have any problem with it; but if you're not, then I would enter a mistrial, and it would have to be tried before another jury. But, if you feel that you're making progress, then return to the room and continue your deliberations.

The jury deliberated for an additional thirty-five minutes before returning a guilty verdict for one count of aggravated rape.

"The right of trial by jury may not be impaired or encumbered with conditions which, in their practical operation, may embarrass or violate the free and full enjoyment of the right." *Kersey v. State*, 525 S.W.2d 139, 144 (Tenn. 1975) (citing *Neely v. State*, 63 Tenn. 174 (1874)). "An instruction that coerces a jury into returning a verdict is bad." *State v. Weston*, 506 S.W.2d 946, 948 (Tenn. Crim. App. 1973). However, instead of an instruction creating the coercion, in this case we are faced with the question of whether the trial court's declaration of a mistrial unduly coerced the jury into arriving at a verdict. We note that the trial court may, in its discretion, order a jury to deliberate further after it appears that the jury is unable to reach a verdict, *Kersey*, 525 S.W.2d at 145, and unless a trial court causes a jury to reach a verdict in such a manner that is "patently not their free and untrammeled verdict, a new trial will not be granted." *Rushing v. State*, 565 S.W.2d 893, 896 (Tenn. Crim. App. 1977).

In this case, the trial court asked the jury if it was deadlocked. Upon confirming the deadlock, the trial court declared a mistrial. The jurors themselves inquired into the meaning of a mistrial and indicated a willingness to work longer toward arriving at a verdict. We cannot conclude that the awareness of the potential for a mistrial, in this case, unduly coerced the jury into arriving at their verdict.

V

The defendant contends that the trial court erred in refusing the defendant's request for the individual polling of jurors. After the foreman reported the verdict, the trial court asked each juror to raise his or her right hand to indicate that each was in agreement with the verdict. The defendant then requested that the jurors be polled individually to which request the trial court responded that they had been and discharged the jury. The defendant claims that an individual poll was necessary to insure jury unanimity and the absence of coercion. The state argues that a showing of hands is comparable to an individual poll.

A trial court may not refuse to poll a jury upon request from either the defendant or the state. T.C.A. § 20-9-508; *Craig v. State*, 506 S.W.2d 949, 950 (Tenn. Crim. App. 1973). The object of polling is to ascertain each individual juror's verdict in order to insure a certainty in the collective verdict. *See Whitwell v. State*, 520 S.W.2d 338, 342 (Tenn. 1975). In *Geodel v. State*, 567 S.W.2d 180, 184 (Tenn. Crim. App. 1978), this court indicated that the trial court should announce the verdict and then inquire individually into each juror's agreement, allowing for a yes or no response from each juror. This process should be followed by the trial court in the future upon request, because it provides the surest means of verifying the fact of both an individual and collective verdict by the jurors. However, although we doubt that an en masse hand-raising necessarily supplies equal certainty of a verdict, we are unable to conclude on the record before us that the polling as conducted masked a less than unanimous verdict.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

/s/ Joseph M. Tipton
Joseph M. Tipton, Judge

CONCUR:

/s/ Gary R. Wade
Gary R. Wade, Judge

/s/ John K. Byers
John K. Byers, Senior Judge